Wong Fook & Anor v Abdul Shukur bin Abdul Halim (Wong Piang Loy, Third Party)

HIGH COURT (IPOH) — CIVIL SUIT NO 2210 OF 1985
ABDUL MALEK J
4 JULY 1990

Tort — Negligence — Road accident — Liability for damages — Whether passenger not wearing seat belt amounts to contributory negligence

Damages (Personal Injury or Death) — Paralysis — Quadriplegia — Permanently confined to wheelchair — Unable to clothe, feed himself, write or propel wheelchair — Loss of sexual function — Chronic infection and ill health — General damages to be awarded — Loss of earnings — Multiplier for cost of nursing care — Multiplier for monthly expenses

The first and second plaintiffs, passengers in a motor vehicle driven by the third party, claimed damages for negligence against the defendant in respect of personal injuries sustained in a motor accident. Before the trial, an agreement was reached on the quantum of general and special damages for the first plaintiff and some items of special damages for the second plaintiff. The issues left for the court to decide were the question of liability between the three parties, general damages for the second plaintiff, and special damages relating to loss of earnings and its multiplier, the multiplier for the cost of nursing care and the multiplier for monthly expenses for toiletries, medicine and wheelchair maintenance. The defendant contended that the second plaintiff, as a passenger in the car, was contributorily negligent in not wearing a seat belt; further as the first plaintiff had died at the date of decision, his claim ought to be extinguished.

Held, allowing the plaintiffs' claim:

(1) Upon the evidence, the story of the third party ought to be accepted. It was clear that the defendant did not stop at all at the junction and was not aware of the approach of the third party's car and had thus been the cause of the accident. The sketch plan and photographs of the damage to both vehicles amply support the third party's story and with the unsatisfactory explanation from the defendant, upon a balance of probabilities, the defendant was 100% liable for the accident.

(2) As to the allegation of contributory negligence by the second plaintiff, it was clear from the evidence that the second plaintiff was wearing a seat belt at the time of the accident. The evidence cannot be disputed by the defendant without any clear evidence to the contrary.

(3) The reduction in liability for not wearing a seat belt may be considered if the person not wearing the seat belt is the driver, who is implicated on the question of negligence; but a passenger is entitled to damages irrespective of whether the driver of the car he was in or the driver of the vehicle which collided into the car in which he was a passenger is found to be negligent by the court. As such there should be no reduction of liability against the defendant especially when the court accepted the fact that the second plaintiff was wearing a seat belt at the time of the accident.

(4) Upon discovering the first plaintiff's death in March 1990, both counsel agreed that the application to replace the first plaintiff should be made at a later stage so as to avoid further postponement of the hearing that was due to take place later in March 1990. The application was then made on 16 April 1990 and was granted on the date of decision before judgment was pronounced, after taking account of the fact that the first plaintiff was still alive when the trial began, that the date for the continuation of the trial had been fixed a number of times, that the quantum affecting the first plaintiff had been agreed to fully at the outset, and that counsel for the defendant had not made any objections when the application was heard.

(5) The second plaintiff was 39 years old at the date of the trial and the multiplier is 11 upon taking two-thirds of the difference between 39 and 55 years. Loss of pre-trial earnings for the second plaintiff was found to be $660 per month with a multiplier of 73 totalling $48,180. As to the cost of nursing care, the court made an award of $250 per month × 73 which is $18,250, and for toiletries, medicine and wheelchair maintenance $110 per month × 73 which is $8,030.

(6) As to loss of future earnings based on $660 per month, a multiplier of 11 was applied, with a total sum of $57,000. The cost of future nursing care awarded and based on $250 per month and a multiplier of 11 was $24,900. For cost of future monthly expenses for toiletries, medicine and wheelchair maintenance, an award of $10,900 was made.

(7) As to general damages for pain, suffering and loss of amenity, it is clear from the injuries suffered by the second plaintiff that he is a quadriplegic. Based on previous authorities, the sum awarded was $180,000.

[Bahasa Malaysia summary

Plaintif yang pertama dan kedua, sebagai penumpang di dalam sebuah kenderaan motor yang dipandu oleh pihak ketiga, telah menuntut gantirugi untuk kecuaian terhadap defendan atas kecederaan diri yang dialami dalam satu kemalangan motor. Sebelum perbicaraan, satu persetujuaan telah dicapai untuk kuantum bagi gantirugi am dan khas untuk plaintif pertama dan beberapa butir untuk gantirugi khas bagi plaintif kedua. Isu yang masih perlu diselesaikan oleh mahkamah ialah liabiliti di antara ketiga-tiga pihak, gantirugi am untuk plaintif kedua, dan gantirugi khas berkenaan dengan kehilangan upah serta pendarabnya, pendarab untuk kos merawat dan pendarab untuk belanja bulanan untuk menjaga serta merawat kecederaan, ubat dan mengendalikan kerusi roda. Defendan berhujah bahawa plaintif kedua, sebagai penumpang di dalam kereta, telah melakukan kecuaian sertaan kerana tidak memakai tali pinggang keledar; tambahan, oleh sebab plaintif pertama telah mati pada tarikh keputusan, tuntutannya harus disifatkan sebagai terhapus.

Diputuskan, membenarkan tuntutan plaintif:

(1) Berdasarkan kepada keterangan, cerita oleh pihak ketiga harus diterima. Adalah jelas bahawa defendan tidak berhenti sama sekali di simpang dan tidak sedar akan kereta pihak ketiga yang telah menghampiri dan seterusnya telah menyebabkan kemalangan. Pelan kasar dan gambar-gambar yang menunjukkan kerosakan ke atas kedua-dua buah kenderaan menyokong cerita oleh pihak ketiga. Dengan keterangan yang tidak memuaskan oleh defendan dan berdasarkan imbangan kebarangkalian, defendan adalah bertanggung jawab 100% untuk kemalangan.

(2) Mengenai dakwaan kecuaian sertaan oleh plaintif kedua, adalah jelas daripada keterangan bahawa plaintif kedua memakai tali pinggang keledar pada masa kemalangan berlaku. Keterangan ini tidak boleh dipertkaikan oleh defendan tanpa sebarang keterangan yang jelas yang menunjukkan sebaliknya.

(3) Penguranggan dalam tanggungan untuk kegagalan memakai tali pinggang keledar boleh diambilkira jikalau orang yang gagal berbuat demikian adalah pemandu yang dibabitkan atas soal kecuaian; tetapi seorang penumpang berhak mendapat gantirugi tanpa mengambilkira samada pemandu kereta yang dinaikinya atau pemandu kenderaan yang melanggar kereta yang dinaikinya didapati cuai oleh mahkamah. Oleh yang demikian, tangunggan tidak harus dikurangkan terhadap defendan apatah lagi mahkamah telah mendapati bahawa plaintif kedua memang memakai tali pinggang keledar pada masa kemalangan itu berlaku.

(4) Setelah mengetahui kematian plaintif pada bulan Mac 1990, kedua-dua peguam telah bersetuju supaya permohonan untuk mengganti plaintif pertama dilakukan pada peringkat yang terkemudian untuk mengelakkan penangguhan tambahan untuk perbicaraan yang dijangka akan bermula pada bulan Mac 1990. Permohonan kemudiannya telah dibuat pada 16 April 1990 dan telah dibenarkan pada tarikh keputusan sebelum penghakiman diberikan. Ini adalah kerana beberapa perkara diambilkira seperti hakikat bahawa plaintif pertama masih hidup apabila perbicaraan bermula, bahawa tarikh untuk menyambung perbicaraan telahpun ditentukan beberapa kali, bahawa kuantum yang melibatkan plaintif pertama telah dipersetujui dengan sepenuhnay sejak dari mula lagi, dan bahawa peguam untuk defendan tidak membuat apa-apa bantahan semasa permohonan didengar.

(5) Plaintif kedua berusia 39 tahun pada masa pebicaraan dan pendarab adalah 11 yakni dua pertiga daripada perbezaan di antara 39 dan 55 tahun. Kehilangan upah sebelum perbicaraan untuk plaintif kedua ada $660 sebulan dengan satu pendarab 73 yang menjadikan jumlah $48,180. Berkenaan kos merawat, mahkamah memberi award sebanyak $250 sebulan kali 73 yang menjadi $18,250 dan untuk menjaga serta merawat kecederaan, ubat dan mengebdalikan kerusi roda pada $110 sebulan kali 73 yang berjumlah $8,030.

(6) Untuk kehilangan upah di masa hadapan yang berdasarkan kepada $660 sebulan, satu pendarab sebanyak 11 telah dipakai dan ini berjumlah $57,000. Kos untuk merawat pada masa hadapan yang diberi berdasarkan kepada $250 sebulan dan satu pendarab 11 adalah $24,900. Untuk kos belanja bulanan masa hadapan untuk menjaga serta merawat kecederaan, ubat dan mengendalikan kerusi roda, award sebanyak $10,900 telah dibuat.

(7) Untuk gantirugi am untuk kesakitan, penderitaan dan kehilangan kesenangan hidup, adalah jelas daripada kecederaan yang dialami oleh plaintif kedua bahawa dia adalah seorang 'quadriplegic'. Berdasarkan kepada autoriti-autoriti jumlah yang diberikan ialah $180,000.]

Cases referred to

1 *Mohamed Repin* v *Lim Yu Kee* [1969] 1 MLJ 64 (folld)
2 *Ong Sim Moy* v *Ong Sim Hoe* [1969] 1 MLJ 82 (folld)
3 *Froom & Ors* v *Butcher* [1975] 3 All ER 520 (refd)
4 *Siti Rahmah bte Ibrahim* v *Marappan s/o Nallan Koundar & Anor* [1989] 1 CLJ 252 (refd)
5 *Marappan & Anor* v *Siti Rahmah bte Ibrahim* [1990] 1 MLJ 99 (refd)

David Tay for the plaintiffs and third party.
Manjeet Singh Dhillon for the defendant.

Cur Adv Vult

Abdul Malek J: The first and second plaintiffs were passengers in car no WT 9876 driven by the third party when it was involved in an accident on 4 April 1984 at about 6pm near Felda Sungai Klah on the Bidor-Kuala Lumpur trunk road. Their car was collided into by van no AAX 2991 driven by the defendant which came out from the Felda Sungai Klah road.

Before the trial began, both counsel had agreed to special damages of $100 for item 1 and $25 for item 2, and general damages of $8,500 for the first plaintiff. For the second plaintiff, settlement was recorded for special damages for item 1 at $500, item 2 at $1,300, item 3 at $40, item 5 at $783, item 6 abandoned, item 7 at $1,010, item 8 at $250 a month and item 9 at $110 a month. As such, the only issues left before the court was the question of liability between the three parties, the question of general damages for the second plaintiff and the question of special damages for the second plaintiff as regards item 4 relating to loss of earnings and its multiplier, item 8 relating to the multiplier for the cost of nursing care and item 8 relating to the multiplier for the monthly expenses for toiletries, medicine and wheelchair maintenance.

First, I shall discuss the question of liability. The third party (PW5) who was the driver of car WT 9876 had given evidence that there were five passengers in his car at the time of the accident, namely, his younger brother the second plaintiff on his left, his father the first plaintiff behind him, the second plaintiff's wife behind the second plaintiff and two of PW5's children aged three and eight years old in the middle of the rear seat. He told the court that when his car was about 100 ft from the junction to the minor road on the left, the defendant's van was 30 ft from that junction on that minor road heading towards the said junction. PW5 had sounded his horn but the van did not stop at the junction and had proceeded to knock into the rear left side of PW5's car.

Consequently, PW5 had lost control of his car which went to the left side of the road and turned turtle. PW5 had pulled his father out and finding that his younger brother had still to come out, he had approached him, undid his seat belt and pulled him out in an unconscious state. PW5 had added that before the second plaintiff was pulled out, his head had touched the roof of the overturned car. Under cross-examination, PW5 had denied that the accident had happened as a result of PW5's car trying to overtake the van while travelling at a fast speed but it had been forced to swerve to the left and had knocked into the said van as there was an oncoming lorry.

The defendant's (DW4's) story was that he had stopped his van at the junction before entering the main road to look left and right for three minutes before giving a light signal to turn left towards Kuala Lumpur. From the left and right directions, DW4 could see as far

as 1km but did not see any vehicles. After he had entered the main road, a car from the rear had suddenly overtaken him and grazed the right side of the van at the signal light in trying to avoid an oncoming car and after that the overtaking car had gone to the left side of the road. When asked why he had stopped for three minutes when there were no approaching vehicles from the left and right as far as 1 km, DW4 had answered that it was his habit to wait long at junctions before proceeding to the main road and he also added that he considered the situation at that time to be dangerous as the rain had just stopped.

With two conflicting versions, the court was forced to refer to the sketch plan, the damage to both vehicles and the relevant photographs. In the circumstances, after having considered all the factors in detail, I was of the view that the story of the third party ought to be accepted based on several reasons. One of them is that the third party had actually seen the defendant's van when approaching the said junction and he had expected the defendant to stop at the junction. In consequence, he had only sounded his horn and had gone on his way. The odd thing is that the defendant had stated that he had stopped at the said junction for three minutes but did not see any vehicle while looking left and right. Why he had had to stop for that long when there were no approaching vehicles from both directions had not been explained by the defendant except that he had clarified that it was his habit in doing so and also that the situation was dangerous at that time as the rain had just stopped.

Another factor is that the defendant had stated that he was on the main road for two minutes before the accident and only when his van was grazed was he aware of the third party's car. The defendant had also seen the oncoming car at a distance of three chains when he first went onto the main road. I cannot accept the defendant's statement in the circumstances as if he had seen the car from Kuala Lumpur three chains away as soon as he entered the main road and two minutes later, he was made aware of the third party's car when it grazed his van, surely he would have seen the car from Kuala Lumpur and the third party's car from Bidor when he had stopped for three minutes at the junction as he could see as far as 1km away in both directions. It is clear that the defendant did not stop at all at the junction and was not aware of the approach of the third party's car from Bidor and thus had been the cause of the accident. The sketch plan and the photographs of the damage to both the vehicles amply support the third party's story and with the unsatisfactory explanation from the defendant, upon a balance of probabilities, my view was that the defendant was 100% liable for the accident.

The situation in this case is almost similar to the facts in the case of *Mohamed Repin* v *Lim Yu Kee*[1] where the court had held that a vehicle coming from a minor road with stop signs going to the major road is fully responsible if it collides with a vehicle on the major road as although the driver of the vehicle on the major road had seen the vehicle on the minor road, he can presume that the vehicle on the minor road will stop at the stop signs. The same principle had been stated and accepted in *Ong Sim Moy & Ors* v *Ong Sim Hoe*.[2]

Learned counsel for the defendant had contended in his written submissions that the defendant's liability ought to be reduced because of the contributory negligence of the second plaintiff who either had not worn his seat belt or had not worn it properly and also because he did not testify. He had referred to the case of *Froom & Ors* v *Butcher*[3] where the court held that if a seat belt is not worn and this had resulted in more serious injury, the liability should be deducted between 15–25%. In this case, counsel for the defendant had stated that as the second plaintiff did not give evidence, the liability should be more than 25% against him and as the wearing of a seat belt is a legal requirement, the second plaintiff's liability should be 100% against him.

I could not accept this contention as it is clear from the evidence of the third party that the second plaintiff was wearing the seat belt at the time of the accident. This evidence cannot be disputed by the defendant without any clear evidence to the contrary. Further, the reduction of liability for not wearing a seat belt may be considered if the person not wearing the seat belt is the driver, who is implicated on the question of negligence, but a passenger, like the second plaintiff, is entitled to damages irrespective of whether the driver of the car he is in or the driver of the vehicle which collided into the car he was a passenger in is found to be negligent by the court. In the event, my opinion was that there should be no reduction of liability against the defendant especially when the court had accepted the fact that the second plaintiff was wearing a seat belt at the time of the accident.

The defendant had also called three witnesses who had been described as experts on seat belts, namely, the SIRIM research officer (DW1), the sales manager for Brimal Holdings (DW2) and the quality control executive for Brimal Holdings (DW3) probably with the intention of showing that the second plaintiff would not be injured the way he was if he had worn the seat belt properly. DW1's testimony was that, for seat belts as in the third party's car, SIRIM had conducted a performance test by using a dummy on a car seat placed on a conveyor and pulled by a pulley with a speed of 20kph and by making a sudden stop. The said test is not an impact test but only a sudden stop test while the dummy

is on a forward motion and not while it is on a reverse motion or upward motion as when the vehicle overturns. According to DW1, the test showed a movement of two inches only at the time of the sudden stop. In the circumstances, my view was that DW1's evidence could not assist the court as regards the extent of movement of a person wearing a static test belt if his car overturns as in this case.

Consequently, the court's view is that if the intention of learned counsel for the defendant was to prove that the second plaintiff did not wear a seat belt at all or did not wear it properly at the time of the accident and because of that his head had touched the roof of the third party's car when it overturned, by calling DW1 it did not make any difference as his testimony was that with a sudden stop test for a forward motion there is already a movement of two inches. The court can take note that by wearing a static seat belt as the one used in the third party's car, certainly the movement would be more if the car overturns and the weight of the passenger would increase the extent of movement. An 'expert' like DW1 was not able to assist the court in this aspect but my finding was whether a person wears a seat belt is not a guarantee that his head would not touch the roof of the car if the car overturns. This view is strengthened by judicial notice that all drivers of rally cars are required to wear 'harness' seat belts and safety helmets and not merely static seat belts. It is clear that the intention is to restrict any possible movement of the driver if the rally car is involved in any accident. Further, the other four passengers in the same car were not injured at the head although they were not wearing seat belts.

DW2's evidence also did not assist the court as it relates only to the manufacture of seat belts by Brimal Holdings following SIRIM's requirements. DW3 had also worked with Brimal Holdings for only seven months before giving evidence and her evidence as regards the test for seat belts which is almost identical to that of DW1 had not helped the court. Moreover, even if we assume the evidence of the three 'experts' could assist the court in knowing what would happen if the vehicle of a person wearing a seat belt overturns, namely, that his head would not touch the roof of the car which would happen to a person not wearing a seat belt, this also would not mean anything as my view is that the second plaintiff was actually wearing a seat belt at the time of the accident and because the legal principles state that he as a passenger is entitled to 100% damages from either or both of the drivers responsible. Consequently, whether or not the second plaintiff gives evidence or not is not important as the testimony of the third party that he was wearing the seat belt had not been rebutted by the defendant. Counsel for the plaintiff had also invited counsel for the defendant to call the second plaintiff if necessary but the offer was not accepted by counsel for the defendant. In the event, this cannot now be the bone of contention of counsel for the defendant as he himself had not availed himself of the opportunity to call the second plaintiff to give evidence.

It may be pertinent at this stage to touch on the death of the first plaintiff on 4 February 1990. As in the case of the second plaintiff, he was also entitled to get damages claimed irrespective of whether the driver of the car (the third party) or the driver of the van (defendant) is found liable for the accident. In his submissions, learned counsel for the defendant had contended that as the first plaintiff had passed away on the date of decision and without any application to replace him with the name of his legal administrator, his claim ought to be considered extinguished.

Learned counsel for both plaintiffs and the third party had submitted that in actual fact the first plaintiff was still alive when the trial began on 25 April 1989. The case had been fixed for continued hearing on 11 July 1989 but the court could not hear the case on the said date. On the date of continued hearing on 5 September 1989, counsel for the defendant had applied for a postponement as the defendant's witnesses could not attend. Consequently, for the continued hearing dates on 18 January 1990 and 15 February 1990, counsel for the defendant had applied for an adjournment as he was involved in another case in another court.

Counsel for the plaintiffs and the third party had only come to know of the first plaintiff's death on 7 March 1990 and as the case had been fixed for continuation on 22 and 23 March 1990, both counsel had agreed, to avoid any further postponement, to the application to replace the first plaintiff being made at a later stage. The application was made on 16 April 1990 and on the date of decision before the judgment was pronounced, the court had allowed the said application after taking into account the fact that the first plaintiff was still alive when the trial began, that the date for the continuation of the trial had been fixed a number of times, that the quantum affecting the first plaintiff had been agreed to fully at the outset and that counsel for the defendant had not made any objections when the application was heard.

I shall now discuss the question of special damages for the second plaintiff for items 4, 8 and 9. Although the second plaintiff did not give evidence due to his physical condition, an officer of the Inland Revenue Department (PW2) had given evidence that the income of the second plaintiff was 'nil' for the years 1977 and 1978, $1,870 for 1979, $4,920 for 1980, $5,752 for 1981, $8,611 for 1982 and $7,900 for 1983. As the date

of the accident was 4 April 1984, it was proper if the 1983 income which was $658 per month was taken into account. For ease of calculation, I had made an award of $660 per month. The pre-trial period from 4 April 1984 to 5 May 1990 is 73 months and consequently, I held that it was appropriate to grant the second plaintiff $660 × 73 which is $48,180 for item 4.

As for items 8 and 9, the amount claimed had been agreed at $250 and $110 respectively. As the pre-trial period had been fixed at 73 months for item 4, the court made an award of $250 × 73 which is $18,250 for item 8 and $110 × 73 which is $8,030 for item 9.

As for the general damages for the second plaintiff, he was 39 years old at the date of trial and the multiplier is 11 if we take two-thirds of the difference between 39 and 55 years. In the event, the award for loss of future earnings based on $660 a month is about $65,000 following the annuity tables which had been used for accidents taking place before the date of the amendments to the Civil Law Act 1956 on 1 October 1984. I had made an error by making an award of $57,000 only while referring to the annuity tables and hopefully this will be corrected by the Supreme Court when this appeal is heard. For cost of future nursing care, based on $250 a month, the amount is $24,919.25 following the annuity tables and I made an award of $24,900. For loss of the future monthly expenses for toiletries, medicine and wheelchair maintenance, based on $110 per month and following the annuity tables, the amount is $10,964.47 and I had made an award of $10,900.

What is left now is the general damages for pain and suffering and loss of amenities for the second plaintiff. The written opinion of the orthopaedic specialist (PW4) as regards the second plaintiff is reproduced here for ease of reference:

1 Mr Wong Sin Loy sustained a fracture subluxation of his cervical spine at the C5 and C6 level following his accident.
2 It had resulted in immediate injury to his spinal cord with cord transection leading to paralysis from C6 dermatone downwards.
3 This has led to loss of sensation below that level with paralysis of motor function in the upper and lower limbs.
4 The paralysis in the upper limbs is incomplete but due to the severe involvement of both hands, the remaining muscle movements proximally at the shoulders and partially at the elbows do not serve any useful purpose. He is unable to use his hands to grasp objects and is unable to clothe or feed himself. He is unable to write or to propel his wheelchair.
5 He is completely paralysed in the lower limbs with complete loss of sensation and motor power. He will be confined to the wheelchair for the rest of his life.
6 Due to paralysis of his bowels, he experiences constipation. Careful attention to diet is necessary to minimise this.
7 Paralysis of the bladder leads to inability to control the discharge of urine. He requires a urine receptable permanently in order to avoid soiling himself. Due to bladder paralysis, he is prone to recurrent urinary tract infection. Proximal spread of infection to involve the kidneys can lead to life threatening consequences of septicemia and renal failure. Sexual function is also lost.
8 Due to the loss of sensation in most parts of the body, he is prone to the development of pressure sores. This is likely to be recurrent in nature and predisposes him to sepsis and chronic ill health. With the paralysis of the upper limbs as well, he is unable to participate in pressure relieving exercises that can minimise the risk of trophic ulcerations.
9 It is likely that there will be no further recovery of the neurological status. He requires constant nursing care and regular medical attention for the rest of his life.
10 The psychological distress he experiences is likely to be severe in view of his disability and he is likely to be given to recurrent attacks of severe depression.

It is clear from the injuries sustained by the second plaintiff that he falls under the term 'quadriplegia' and I had discussed the authorities for this condition in *Siti Rahman bte Ibrahim* v *Marappan s/o Nallan Koundar & Anor*[4] where I had made an award of $180,000 and which had been confirmed by the Supreme Court in *Marappan & Anor* v *Siti Rahmah bte Ibrahim*.[5] In this case, too, I held that the proper award which should be given is $180,000 for pain and suffering and loss of amenities and made the said award.

Finally, I had granted interest at 8% on general damages except for future losses from the date of service of the writ to the date of judgment and interest at 4% on special damages from the date of accident to the date of judgment. Costs are to be taxed accordingly.

Order accordingly.

Solicitors: *Murphy & Dunbar; Manjeet Singh Dhillon.*

Reported by *Azra Moiz*